Issue: Qualification – Discipline (Counseling Memo); Ruling Date: March 11, 2015; Ruling No. 2015-4108; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-4108
March 11, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether the grievance he initiated on or about December 19, 2014 with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On November 20, 2014, the grievant received a Notice of Improvement Needed form for unsatisfactory attendance. He initiated a grievance to challenge the agency's action on or about December 19, 2014. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed this decision to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment

[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

The management action challenged in the December 19, 2014 grievance, a Notice of Improvement Needed, is a form of written counseling. Written counseling does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[7] Therefore, the grievant's challenge to the Notice of Improvement Needed does not qualify for hearing. However, should the Notice of Improvement Needed grieved in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.[8]

EDR's qualification rulings are final and nonappealable.[9]

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Director
Office of Employment Dispute Resolution

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[8] In reaching the decision that this grievance does not qualify for hearing, EDR has determined only that the grievant has not experienced an adverse employment action. EDR has not made any findings as to whether the occurrences for which the grievant received the Notice of Improvement Needed were correctly determined by the agency to be outside FMLA protection. In any subsequent grievance hearing involving these occurrences described above, the hearing officer may consider whether the agency appropriately found that the occurrences were not protected under the FMLA.
[9] Va. Code § 2.2-1202.1(5).